Supreme Court of the United States

OCTOBER TERM, 1946

No. 1225

JOHN J. CASALE, INC.,

Petitioner,

vs.

LOREN SKIDMORE, THOMAS McKASEY, CONRAD A. FUGMAN, BENJAMIN TROTTIE, JOHN SCHRANKO, THEODORE DRIMONAS, JACOB KNOL, CAMERON OLTON, ROGELIO M. LOPEZ, GEORGE STENGLE, AXEL SWENSON, JOHN R. RUSIECKI, LEON JOHNSON, GEORGE SHEFTICK, ROBERT I. MITCHELL, WARREN WELLS, GEORGE SARIS, MICHAEL GARCIA, JOHN DODSON, FELIX J. DOCOBO, DANIEL C. SWEENEY and THOMAS O'DONNELL, suing in behalf of themselves and other employees similarly situated,

Respondents.

JOHN J. CASALE, INC.,

Petitioner,

vs.

JOSEPH MOONEY, HARRY SMITH, MARVIN H. WILSON, JOHN JORDAN, DAVID DAVIDSON, JOHN EHRET and FRED ROHLEDER, suing in behalf of themselves and other employees similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

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TO THE HONORABLE FRED M. VINSON, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

Summary Statement of Matter Involved

These were consolidated actions against petitioner, John J. Casale, Inc., instituted against it in the United States District Court for the Southern District of New York by various of its employees claiming of it unpaid overtime compensation, penalties and counsel fee as if warranted by Sections 7 (a) and 16 (b) of the Fair Labor Standards Act of Congress. The opinion of the District Court was rendered April 29, 1946, and is reported at 66 Fed. Supp. 282. The judgment of the District Court was entered September 11, 1946 (Rec. 481). The opinion of the Circuit Court of Appeals for the Second Circuit was rendered March 6, 1947, and the judgment of that Court was entered March 6, 1947. The opinion of that Court is not yet officially reported.

The District Court concluded that all the suing employees, except two, were entitled to judgment against the petitioner. The Court of Appeals affirmed as to those in whose favor a judgment had been entered, but reversed (in his favor) and remanded as to employee Dodson with respect to a certain period of time and place of occupation.

The petitioner corporate employer was, throughout the years involved, the legal owner of a very large number of freight motor trucks in New York City, amounting to around 500 in 1938 and having become more than 1000 by 1946. But the corporation did not *operate* any of those trucks. It leased them out, under long term written leases, to about 70 business concerns in New York City, who in turn operated and used them exclusively in their own company local delivery of their own commodities which previously had been completely manufactured. The petitioner was paid by its lessees an agreed fixed amount of rental regardless of the extent of use of the leased property, plus a small amount of extra rental based upon the amount of mileage used by its respective lessees.

The truck vehicles were at all times operated by and under the sole direction and control of the lessees. The

petitioner did not have any responsibility for the accomplishment of any freight transportation in those vehicles by the lessees nor was it liable for any loss, damage, theftage or delays of freight cargoes resulting from any transportation performed by these vehicles. It did not even have knowledge of what or when or how much freight was put by the lessees into the leased vehicles, or between what places and when the vehicles were moved by the lessees in making deliveries of their finished goods.

The petitioner did not select its individual lessees with knowledge of or with any concern as to whether or not any of its truck vehicles would be used by them in their own local interstate or intra state commerce respectively, or in what proportions. The vehicles leased by it were identifiably assigned to each of the particular lessees respectively, painted solely with the names and advertising matter of those individual lessees, and used by those respective lessees as they pleased without any restriction other than that the vehicles should be confined to uses in the regular businesses of the lessees.

Being the legal owner of the leased property, and wishing to preserve its capital value, the petitioner stipulated in all its leases that it, alone, and out of the rentals paid to it, would do any needed repairing, cleaning and greasing of the vehicles, and their fueling. To that end the petitioner possessed various truck garages in New York City to which it required that the lessees should return the vehicles for at least four hours in each period of twenty-four unless otherwise agreed. It was during such periods that the petitioner's own employees examined the vehicles to determine their condition, washed them, greased any of them when needed, and kept the fuel tanks filled.

Also periodically (based on the extent of vehicle mileage consumed) each vehicle was withdrawn from the lessees' use and another substituted, during which times the petitioner would completely overhaul the withdrawn vehicle in its mechanical shop. To that end it employed a number of mechanics, and whose labor also was used when occasionally any one of petitioner's vehicles might have suddenly broken

down or been in an accident requiring major repairs at once.

To the extent that petitioner as the lessor furnished gasoline, oil and tires for its leased vehicles, the City of New York deemed them sales of commodities and exacted from lessees of the petitioner a City sales tax.

The suing employes of petitioner are, variously, its mechanics, washers and greasers above mentioned.

As a part of their evidence, the suing employes established that they individually worked for long stretches of time at some one or another of the particular truck garages of the petitioner; they showed the kind of work they respectively did; they showed that the trucks of a particular lessee would be invariably kept in a particular garage; and they showed the compensation paid to them by petitioner and the hours they worked.

In addition they showed that numerically most of the lessees of the petitioner used the vehicles leased by them exclusively in their *intrastate* commerce wholly within New York City. It appeared, however, that others of such lessees did to *some* extent use *some* of their leased vehicles in their local interstate commerce between New York City and across the Hudson River in New Jersey. Also to a very small extent some of the vehicles also were used by a few of the lessees in their local New York City haulage of interstate or foreign goods of their own to or from railroad or truck stations or water piers in New York City.

Basing their calculations solely upon the respective number of *miles* of the truck uses the suing employes established through evidence obtained from various of the lessees of petitioner that of all the truck vehicles usually stored at any one of the petitioner's garages some would never be used by the lessees in that local interstate commerce, others would be occasionally, and still others to some extent regularly. The District Court found from such evidence that, taken as a whole, based upon the respective mileages of truck operations by the lessees, in the aggregate 20% to 25% of that mileage was interstate but of course variable as

between lessees, times, individual vehicles, and as between those stored in the separate garages.

The District Court and the Circuit Appellate Court did not find, nor was there any evidence offered enabling a finding, as to which particular truck vehicles were used by the lessees at any particular time in their interstate commerce, or during what particular periods of time did any particular one of the suing employes perform any labor with relation to any particular truck vehicle so currently used by a lessee in its interstate commerce. While no one of the suing employes was assigned to work concerning any particular vehicles, with reference to their use in interstate or intrastate commerce by the lessees, no effort was made to establish that during any particular week or longer that any particular such employe performed any work connected with one or more particular vehicles in recurrent interstate use at the time by a lessee of the petitioner.

The District Court concluded that it would make no difference under the foregoing facts that the petitioning company was not itself engaged in interstate commerce, because (it said) had the suing employees been employed by the lessees instead of the petitioner, then the character of work done by them would have caused them to be engaged in interstate commerce of the lessees. It was also concluded by the District Court that no burden rested upon the suing employes to establish that during any particular period of time they actually performed any labor for petitioner related to vehicles recurrently used by the truck lessees in their own interstate commerce inasmuch as their labor was not *required* to be segregated.

The Circuit Court of Appeals for the Second Circuit affirmatively decided that the petitioning company was *not* itself engaged in interstate commerce. It also decided that petitioner corporation was not itself *operating* any instrumentality of interstate commerce. It was concluded, however, that inasmuch as a motor truck *when used by a lessee* in its own commodity deliveries, might be so used by it in interstate commerce, then that the individual truck vehicle

itself, although operated by the lessee, would be a machine used in interstate commerce. From that, it was held, it resulted that the suing employes of petitioner would be deemed under the statute engaged in interstate commerce because, although performing their labor locally for the *petitioner*, that labor related to vehicles used by the lessees of petitioner in their own interstate commerce in an *aggregate* substantial amount.

As to the complete failure of the suing employes to identify their labor with regard to any particular period of time in relation to any particular vehicles then currently used by the lessees in their interstate commerce, the Circuit Court of Appeals concluded that such failure was not material under this statute because the suing employees performed their labor indiscriminately without special assignment to particular vehicles as if depending upon their interstate or intrastate use by the lessees, that the aggregate over-all interstate use of the vehicles was "substantial" and that it therefore was proper to "infer" labor each week within the coverage of the statute.

Jurisdictional Statement

It is respectfully submitted that the United States Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925, (C. 229; 43 Stat. 936) amending the Judicial Code, Section 240 (a), Title 28 U. S. C. A., Section 347 (a); and under Rule 38, subdivision (5) of the Rules of the Supreme Court.

Questions Presented

The principal issues to be resolved by the Supreme Court are these:

(1) When no question of "production for commerce", as legislatively defined in this statute, is involved, and when an employer, sued under this statute, does not itself *operate*

any instrumentality of interstate commerce, can its own employes be deemed engaged in interstate commerce when the employer itself is not so engaged?

(2) When the lessor-owner of property assumes under its leases the responsibility for keeping its leased property in good serviceable condition and appearance are the employes of that lessor-owner deemed to be engaged in interstate commerce because some of the lessees chose in varying degrees to use the property leased by them in their own separate interstate commerce?

(3) Because those employes of the lessor-owner performed their tasks for the petitioner indiscriminately without regard to whether the leased property was or was not used by the lessees in their own interstate commerce may those employes recover against their employer without each showing for himself whether or not during any particular work week he did actually perform his labor upon any such property which a lessee may have used in the interstate commerce of the lessee, even if it were immaterial whether the petitioner was engaged in interstate commerce?

Reasons Relied on for Allowance of Writ

1. No one of the stated questions has heretofore been directly decided by this Court in a case involving "commerce" as distinguished from "production for commerce". The first two are questions of substantive importance in respect to the application or non-application of the Fair Labor Standards Act to labor upon locally leased property by employees of a lessor-owner when some part of the use of the leased property by the lessees is for their own separate interstate commerce. The third of the questions presented is of equal national importance because it goes to the point of inquiry as whether or not a laborer, if deemed at times to be engaged in interstate commerce and at other times not, is required by competent proof to demonstrate

which of his previous work weeks did include labor in any such interstate commerce.

2. On the questions here involved there is direct disagreement between the Circuit Courts of Appeal which have dealt with them, and with respect to those questions consistent administration of the statute requires their authoritative determination by this Court.

3. Thus, as to whether suing employees can ever be deemed to have been engaged in interstate commerce, when their employer was *not* so engaged, the Fifth Circuit Court of Appeals holds in the light of recent decisions of this Court that before an employee can be deemed to have been engaged in interstate commerce his own employer must have been so engaged, and that even if an employer was so engaged, it would be the particular work of the suing employee and not the general business of his employer which would be determinative (*Lewis* vs. *Florida Power etc.*, 154 Fed. 2d 751; *Wilson* vs. *R. F. C.*, 158 Fed. 2d. 564. The Second Circuit Court of Appeals in the present case, however, holds that although the petitioning employer was *not* engaged to any extent at all in interstate commerce and did not itself *operate* any instrumentality of interstate commerce, yet that such legal circumstance is immaterial under this statute.

As to the other important question here involved the Eighth and Fifth Circuit Courts of Appeal hold that when the labor of a suing employee was indiscriminately but in part in intrastate commerce and in part in interstate commerce, and it was separable in the respective periods of time devoted to each, the "week" is the unit of application of this statute, and it must be shown as to any individual suing employee that during any given week his particular labor consisted of interstate commerce (*Schwarz* vs. *Witwer Grocery Co.*, 141 Fed. 2d. 341, certiorari denied, 322 U. S. 753; *Super-Cold S. W. Co.* vs. *McBride*, 124 Fed. 2d. 90-92). The Second Circuit Court of Appeals in its decision in the present case, holds, however, that if, through a stretch of

many weeks, the aggregate interstate work of an individual employee was "substantial" and the employee worked indiscriminately in interstate or intrastate commerce, the suing employee need not identify the *particular* weeks during which his work was in any "substantial" part interstate and those in which it was not because it is permissible to "infer" devotion to interstate commerce each week.

ARGUMENT

Summary of Argument

Certiorari should be granted for the reason that:

Point I

Unlike its distinctive legislative definition of "production for commerce" Congress did not in this statute define "commerce" so as to include "any process or occupation necessary to commerce". Congress did not, in this statute, regulate those whose business or labor only "affects" interstate commerce. It therefore results that if a sued employer was not *itself* engaged in interstate commerce and did not *operate* an instrumentality of interstate commerce then no labor performed for it by any of its own employes *could* have been in interstate commerce.

Point II

A lessor of property has the right through its own employed labor to maintain the capital value of its leased property and to keep it in good appearance and operating condition. Because the lessee benefits therefrom that added expense of the lessor may be embraced within the whole rental. But because some of the lessees variably may choose to some extent to use the leased property in their *own* interstate commerce that does not cause the employees of the lessor themselves to be engaged in interstate commerce because of their work for the lessor in maintaining the employer's leased property.

Point III

Even if an employer was engaged in interstate commerce, or even if it was immaterial whether he was or not, unless an employee suing under this statute shows by his evidence in what particular weeks he was engaged in interstate commerce then he may not recover at all, especially when, as here, the record so clearly shows that while the labor of each individual employee was indiscriminate as between vehicles used in intra or interstate commerce of the lessees there was no inherent reason why as to any particular employee there should have been any interstate labor by him during any one or another of any particular week.

DISCUSSION

The need for an employer to have been engaged in interstate commerce.

The Court below expressly concluded that the petitioner corporation, the employer which has here been sued, was not itself engaged in interstate commerce, or in the production of goods for commerce, or in the *operation* of an instrumentality of interstate commerce. That, it was held, is not material, even though it was said that a minimal amount of engagement in interstate commerce by the employer "will suffice for the purposes of classifying the employer". Here there was no "minimal" engagement in interstate commerce by the employer!

The attention of the Court below, both in brief and argument, was particularly directed to the fact that it is the business employers who are being regulated by this Federal statute which was enacted under the constitutional authority to regulate interstate commerce. Congress chose in this statute not to regulate those activities which merely "affect" interstate commerce except to the extent embraced within the distinctive and elaborated legislative definition

of "production of goods for commerce". When, therefore, in such a case as this the application or non-application of the statute turns entirely upon the question whether the suing employees were engaged in interstate commerce it would seem impossible that they *could* have been when their own employer was *not*. It would be a contradiction of thinking to suppose that a corporate employee, as the agent of his employer, could engage in tasks that would, as to him, be interstate while at the same time the principal (his employer) as to those same activities was *not* engaged in interstate commerce.

The decisions of the Supreme Court of the United States in the recent cases of *Walling* v. *Jacksonville Paper Case,* 317 U. S. 564, and *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178, were put before the Court below. In the *Jacksonville Paper* case the whole inquiry of the Supreme Court was directed to the determination of what parts of the business of the sued *employer* were interstate and which were not. To make those determinations the Supreme Court said—

> "entails an analysis of the various types of transactions and particular course of business along the lines we have indicated".

Some of the business of the Jacksonville Paper Company it decided to have been interstate and some not. The Supreme Court then went on to say:

> "The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent upon the character of the employees' work".

In *Mabee* v. *White Plains Paper Company* the whole inquiry of the Supreme Court was likewise directed to the question whether the employer publishing company was engaged in the "production of goods for commerce" within contemplation of law. The Supreme Court comprehensively

dealt with that question and resolved it in the following statement of ultimate conclusion:

> "We hold that respondent (employer) is engaged in the production of goods for commerce".

Immediately following that stated determination the Supreme Court then took pains to say that it did not result that the particular suing employees were there covered by the Act. That, the Court said, would depend upon the nature of their own duties in relation to the small amount of "production for commerce" in which the defendant employer was there held to have been engaged. Having first concluded that the White Plains Publishing Company was itself as a business employer engaged in such "production" the Supreme Court then immediately added:

> "That, of course, does not mean that these petitioners, its employees, are covered by the Act. The applicability of the Act to them is dependent upon the particular character of their work".

The essential principle of *Kirschbaum* v. *Walling* is not here being drawn in question. That early decision concerned activities which were held to consist of "production of goods for commerce" under the extended and very expressly chosen legislative definition of the term "produced" in the statute. The loft building owner in that case *was* just as much engaged in production of goods for commerce within that legislative definition as were its employees. If the running of the elevator there involved was an "occupation necessary" to that garment production the employer providing that elevator service was as much engaged in the "production" as its own agent employees who manipulated the elevator controls.

But even when dealing with cases involving the legislative definition of "production" the nature of the employer's business is at least of "weight". Thus it was

said in the recent decision of the Supreme Court in *Armour & Co.* v. *Wantock*, 323 U. S. 126:

> "The fact that respondents were hired by an employer which shows no ostensible purpose for being in business except to produce goods for commerce is not without weight, even though we recognized in *Kirschbaum* v. *Walling* that it might not always be decisive".

When, however, dealing with cases not in any way involving a claim of "production for commerce" there will not be found in the statute any language defining the term "commerce" so as to embrace "processes or occupations necessary to" interstate commerce. Therefore, to be "engaged in commerce" means precisely that and nothing else. Merely to "affect" interstate commerce would not suffice for coverage under this Act. Expressly did Congress reject all efforts made to induce it otherwise.

It therefore results that unless an employer which has been sued was *itself* engaged in interstate commerce or *operated* an instrumentality of interstate commerce no one of its employee agents *could* have been engaged in interstate commerce or in the operation of an instrumentality of interstate commerce within any constitutional or statutory concept that would be possible.

The Court below very expressly invited the issue in this respect by candidly dealing with the case as one not involving an employer engaged in interstate commerce or operating an instrumentality of interstate commerce. By indirection, however, its ultimate conclusion of coverage would simply supply by judicial decision the equivalent of amendatory legislation reversing a deliberate policy which Congress chose despite consistent efforts to pursuade it otherwise.

Conflict of Decisions as to the Need for the Employer to Have Been Engaged in Interstate Commerce

The Court below (the 2nd Circuit Court of Appeals) appreciated that its point of view was directly opposed to that of the 5th Circuit Court of Appeals on the foregoing question. The decision of that Circuit Court of Appeals in *Lewis* v. *Florida Power and Light Co.*, 154 Fed. 2d 751, was pressed upon the notice of the 2nd Circuit Court of Appeals. In the *Lewis* case the 5th Circuit Court of Appeals had recently held:

> "While the nature of the employer's business is not determinative of the rights of employees under the Act, because the application of the Act depends upon the character of the employees' activities (*Overstreet* v. *North Shore Corp.*, 318 U. S. 125) nevertheless unless an employer is 'engaged in commerce', or 'engaged in the production of goods for commerce' the employees are not 'engaged in commerce' or 'engaged in the production of goods for commerce'. (*Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178). Therefore it is proper to inquire whether the Court below erred in its holding that the defendant is neither engaged in 'commerce' nor engaged 'in the production of goods for commerce'."

To the same effect was that court's still more recent decision in *Wilson* v. *R. F. C.*, 158 F. 2d 564.

When writing the opinion for the Court in the present case Judge Frank purposely made no mention of the point of view of the 5th Circuit Court of Appeals with reference to the need for an employer to have been engaged in interstate commerce.

The Petitioner Did Not Operate an Instrumentality of Interstate Commerce

Both the District Court and the 2nd Circuit Court of Appeals seemingly were influenced by *Overstreet* v. *North Shore Corp.*, 318 U. S. 125. By closely divided vote the

Supreme Court had there concluded that while the business of operating an interstate bridge and toll road was not itself interstate commerce yet that certain employees of the employer in that case could recover under that Act. There, however, the need for the employer to have been engaged in interstate commerce was apparently dispensed with because of the conclusion of the Supreme Court that the employer was *operating an instrumentality of interstate commerce.* The employees of the bridge company were the agents through whom the bridge company accomplished its business purpose not only of supplying but of *operating* those two stationary facilities. Here, in the present case, the 2nd Circuit Court of Appeals noted that it is not the petitioning employer who operated the truck vehicles. It did not, however, deem that circumstance consequential. *Instead it proceeded on the hypothesis that the suing employees would have been engaged in interstate commerce had they worked for the lessees of the trucks who did do the operating of them instead of for the petitioner. And that alone was deemed enough.*

Employees of the Lessor of Business Property Are Not Caused to be Engaged in Interstate Commerce Merely Because Some of the Lessees May Use the Leased Property in Their Own Interstate Commerce. The Boutell Case is Not to the Contrary

It is a common incident of the ownership of leased property that the lessor, through employees of its own, often prefers to keep up its capital value by keeping it in good usable condition at its own expense. Motor trucks would rapidly lose their value and often be unfit for service unless a high standard of maintenance, both preventive and repair, as well as appearance, be practiced. The owner of such trucks, permitting them to be used and operated by lessees, would soon find its property badly neglected if most lessees were responsible for their care and upkeep.

The Court below, failing to observe the underlying distinction in that regard, stated its view that the decision in *Boutell* v. *Walling,* 327 U. S. 463, "is most closely analogous to the instant case". But there, like *Petersen* v. *J. F. Fitzgerald Construction Co.,* 318 U. S. 740, the *business* of that employer was the repairing of property owned and operated by certain public utilities—a motor truck common carrier in the one instance and a railroad company in the other. Each of those public utilities was essentially interstate in character. They were unmistakably "instrumentalities of interstate commerce". In such cases (the Supreme Court said) those activities are interstate.

Here, however, the Court below did not observe the distinction that in the present case the labor of the suing employees was (1) in behalf of and upon the property of their own employer and (2) the individual lessees of the trucks did not remotely correspond to public utilities or "instrumentalities of interstate commerce" in the familiar sense of toll bridges, railroads, public motor carirers or telephone or telegraph companies. Those lessees of the trucks in the present case were business concerns which merely used their leased truck vehicles for local deliveries of their own previously manufactured goods, chiefly in New York City but to some extent across the Hudson River on the New Jersey side of New York Harbor.

The 5th Circuit Court of Appeals decided in *Johnson* v. *Dallas Downtown Development Co.,* 132 F. 2d 287, that the owner-lessor of property, having no other business, would not be engaged in interstate commerce (no production being involved) because it leased its property to a number of others some of whom to some substantial extent were, on their own accounts, engaged in interstate commerce and used the leased property in conducting it. That being so (that Court held) it resulted that those employees of the owner-lessor who maintained the leased property in service condition would not be engaged in interstate commerce. The Supreme Court declined certiorari, 318 U. S.

790. Similarly the Supreme Court of the United States in *10 East 40th Street Building* v. *Callus*, 325 U. S. 578, dealt with leased property in a case wherein the suing employees worked for the property owner who was not itself engaged in interstate commerce but some of whose lessees were. The workers there suing were maintenance employees whose labor concerned the upkeep of the leased property used by others in their own interstate commerce. The Supreme Court in a very pointed choice of language held:

> "Obviously they (the employees) are not 'engaged in commerce'."

The interstate lessees in the *Johnson* and *Callus* cases received, in their property rentals, the benefits of the labor of the employees of the property owners. Here, in the present case, the lessees of the petitioning property owner, likewise received the benefits of the fact that it is their lessor who keeps its leased property in serviceable condition through employees of its own.

Boutell v. *Walling* could not have been intended by the Supreme Court of the United States to qualify those of its previous decisions dealing with leased properties. It goes far enough to say (as it was in *Boutell*) that the employees of an independent contractor, working upon the property *owned and operated by an instrumentality of interstate commerce,* may thereby become a part of that interstate commerce. But here neither the petitioner nor its lessees were operating "instrumentalities of interstate commerce" in the sense of any meaning heretofore ascribed to that conception. Nor, here, was the petitioner *operating* any vehicles at all or otherwise engaged in interstate commerce. Neither it nor its employees were engaged in the business of servicing transportation machines belonging to others. The suing employees worked for the petitioner, and that work was upon vehicles *owned* by the petitioner and used by it in its *own* business of merely leasing truck vehicles to others.

The Compensable Overtime Unit Under This Statute is the Period Beyond Forty Consecutive Hours in any One Week. For an Individual Employee to Recover for any Particular Week He Must Therefore Show by Proof That During That Particular Week He Was Engaged in Interstate Commerce. It is not Enough to "Infer" That He Might Have Been so Engaged That Week.

The Court below is in direct conflict with the 8th and 5th Circuit Courts of Appeal on an important question not heretofore directly decided by the Supreme Court.

In *Schwarz* v. *Witwer Grocer Co.,* 49 F. Supp. 1003, a District Court of the United States gave judgment under this statute for a corporate defendant upon the ground that

> "The weight of authority clearly indicates that when the employee works both in intrastate and interstate commerce, the burden is upon him to point out what part of his work was in intrastate and what part in interstate commerce, and the extent of the interstate work and when performed".

The 8th Circuit Court of Appeals affirmed in 141 Fed. 2d 341. The Supreme Court of the United States denied certiorari in 322 U. S. 753. The Court of Appeals observed that some of the work done by the suing employees was interstate and some not. Speaking of the interstate work that Court said:

> "* * * When they did that or how much time they gave to that work does not appear. * * * It would seem to be elementary that an employee seeking to recover under the Act should be required to prove that he comes within its terms: (a) that he was an employee 'who is engaged in commerce' and (b) how many hours he has been so engaged".

The 5th Circuit Court of Appeals in *Super-Cold Southwest Co.* v. *McBride,* 124 Fed. 2d 90, having before it the same problem held:

> "An employee * * * working both interstate and intrastate must point out what part of his work was in intrastate and what part in interstate commerce".

In the present case, however, the holding of the Court below was that it is permissible to "infer" engagement in interstate commerce by a suing employee where—

> "there was no evidence that the work on the trucks used in interstate commerce was separate from that on trucks used only intrastate, and it appears that all the employees worked on all the trucks housed at the garages in which they were employed. The trial judge found that the work on these trucks was constant and not sporadic; and it was proper for him to infer, * * * that each of the employees spent a substantial amount of time on trucks used in interstate commerce."

The conflict here between the several Circuit Courts of Appeal is direct and goes to a fundamental question. The facts found in this connection were that of the *total* mileage of *all* the leased trucks somewhere around 25 per cent of it was performed by various of the lessees in their own interstate local deliveries. Each of the suing employees of the petitioner, it was further found, devoted his labor continuously to first one and then another of the motor trucks so owned and leased out by the petitioner. A theoretical average therefore would indicate that not more than 25 per cent of the whole time of an individual suing employee in the course of a given *year* or *month* would concern vehicles used to *any* extent whatsoever by lessees in interstate commerce. As the prohibition of the statute is against uncompensated hours beyond 40 in any one "week" it would not follow that any individual one of these suing employees even so much as touched in the course of any particular *week* any one or more vehicles so used in interstate commerce by some one or another lessee.

Take for instance the situation of the mechanics. Essentially their jobs consisted of heavy duty overhauling periodically after a predetermined number of thousands of miles had been performed by a particular truck of a particular lessee. That kind of heavy duty overhauling on any single truck vehicle takes a number of consecutive days. The vehicles were actually withdrawn from use by the lessees

during those lengthy periods and other vehicles substituted. Consequently there is no more reason to suppose that a given one of these mechanics, during any given previous week, performed heavy duty overhauling job on a truck vehicle which recently had been or subsequently would soon be used by a lessee in its own interstate commerce than that he might have worked a number of consecutive weeks on particular vehicles which *never* had been or ever would be used by a lessee in interstate commerce to any extent whatsoever.

Similarly with regard to greasers. Motor trucks are not greased continuously. A given greaser would not necessarily touch in the course of any given one or another week a vehicle which had been or was being or would soon be used in interstate commerce by a lessee.

The washing of truck vehicles for an owner seems quite remote from the interstate commerce of a lessee of the vehicles. In any event in a given garage there might be stored during a part of each 24 hour period perhaps 50 vehicles. Of those perhaps only 5 will have been in interstate use by a lessee in the course of a given week, accounting for a total of about 25 per cent of the *mileage* of all the 50 truck vehicles stored at that place the distances being greater in interstate than in intrastate use. To "infer" that *each* of the washers in such a garage necessarily worked upon those particular 5 truck vehicles each week consecutively for a number of years would be fanciful.

During the oral argument in the Court below it was remarked from the Bench by Judge Frank that employers would regret a judicial conclusion that would require an employee to identify for each week whether his work in that week concerned interstate commerce. The basis for that suggested regret was that in such event the Administrator of the Wage and Hour Division would likely impose the requirement that such an employer make a recorded segregation.

But no such requirement has heretofore been imposed by the Administrator. Had it in fact been imposed no

doubt the burden of proof resting upon the employees would have been more readily borne by them. But here they failed completely even to try to demonstrate as to any particular week which if any of those employees labored at all upon one or more vehicles which the lessees had been using currently in their own interstate commerce. It was not permissible to supply that evidence in the way the Court below has proposed, i.e. "to infer" the facts. No such "inference" is deserved here any more than it would have been deserved in the previous cases decided on the same point by the 8th and 5th Circuit Courts of Appeal.

Conclusion

It is respectfully urged that the case is one of broad importance under the Fair Labor Standards Act as to which substantial disagreements exist between various of the Circuit Courts of Appeal. Certiorari should, under such circumstances, be granted.

Respectfully,

CHARLES E. COTTERILL,
70 East 45th Street,
New York, N. Y.
Counsel for Petitioner.

Dated: April 7, 1947.

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1225

JOHN J. CASALE, INC.,
Petitioner,

vs.

LOREN SKIDMORE, et al.,
Respondents.

JOHN J. CASALE, INC.,
Petitioner,

vs.

JOSEPH MOONEY, et al.,
Respondents.

REPLY BRIEF IN BEHALF OF PETITIONER FOR CERTIORARI

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Counsel for the respondents take these two positions: (1) they say that while it is true, as petitioner contends, that an employee cannot have been engaged in interstate commerce if his employer was not, yet, in the present case, the petitioning employer must have been engaged in interstate commerce because, although the two courts below said it was not so engaged, its employees nevertheless were,

and (2) each of the suing employees was shown by evidence to have been engaged *each week* in a substantial amount of interstate commerce. Taking those positions as to the asserted facts of record (neither of which did the courts below sustain) the contention now is that there is no question of national public importance nor any question of conflicts of decisions between appellate United States courts warranting certiorari.

I.

Engagement in Interstate Commerce.

Respondents' counsel agree that even in the *Kirschbaum* decision itself it was observed by this Court that if suing employees were engaged in interstate commerce so too to that extent must have been their employer. As a corollary it naturally follows that if the employer itself was *not* engaged in interstate commerce then no one of its employees *could* have been. The 5th Circuit Court of Appeals so holds in terms. In the present case the 2nd Circuit Court of Appeals holds directly to the contrary. Its view is that in the present case the employer itself was *not* engaged in interstate commerce but that its employees *were* and it simply ignored the conflict between its own view of the possibility of such a situation and the directly contrary view of the 5th Circuit Court of Appeals as to its impossibility.

Counsel for the respondents here do not escape the difficulty in the way they endeavor. All their emphasis is upon the contention that in the case of *Boutell* v. *Walling* the holding of this Court was that the work of the employees of one company consisting of mechanical labor upon truck vehicles of common carrier motor trucking companies, would be interstate commerce when those common carrier trucking companies are themselves interstate carriers. But here the petitioning company and its employees

were not engaged in any business or labor consisting of the servicing of property for any public carriers or other "instrumentalities of commerce". Here, as in the *Callus* decision of this Court, the property involved was *owned* by the petitioner who, as the lessor, elected to assure the keeping up of its capital value and the usefulness of the leased property by doing its own repair work through its own employees. In the *Callus* case the property involved was an office building much of the space of which was used by lessees in the conduct of their own interstate commerce. The owner of the building and its employees ran the elevators, furnished the lights, cleaned the offices and kept them in repair, supplied watchman service, etc., etc. This Court held that neither the building owner nor its employees who so serviced the interstate users of the leased building were engaged in interstate commerce. Here, in the present case, the property involved is not real but personal. The petitioning owner leased it out to others under long-term written leases. In its own interest and behalf, and as a part of its lease obligation, the petitioner kept the leased property in good and useful condition. That personalty, consisting of motor trucks was not used by the petitioner or by any public carriers or any other "instrumentalities of commerce". It was used only by numerous private lessee business houses who operated the vehicles themselves in making the respective deliveries of their own finished goods —chiefly in New York City.

It appears of record that among the numerous employees engaged by the petitioner two were known as "trouble shooters". As distinguished from all the other of the company mechanics, washers, etc. it was their duty to leave the premises of the plaintiff and go out wherever their employer's truck on the highways may have been in distress and in need of temporary road repair. Those needs did include temporary repair work of that sort by them in New Jersey enough to be "substantial" in relation to their division of time. But they would still be doing their work upon their own employer's property and their own employer was

not engaged in interstate commerce. Besides, because of the activities of those two employees it could never be concluded that *all* the mechanics and all *other* employees of the petitioner whose entire work was in their employer's own places would cause them to have been engaged in interstate commerce.

II.

Division of Time.

Certiorari has also been asked by the petitioner upon the ground of a fundamental conflict of decision between three of the Circuit Courts of Appeal as to the kind and degree of proof needed to demonstrate convincingly that in the course of *each week* was each suing employee engaged in interstate commerce. In their brief counsel for the respondents seemingly accept the need for such evidence. But (they say) it was contained in the record. The 2nd Circuit Court of Appeals did not say so, nor did the District Court. The District Court appears to have supposed that the individual week would not be a unit under this statute. The 2nd Circuit Court of Appeals rightly assumed that the individual week *would* be the unit but held that it could be "inferred" that in each week each of the suing employees was, to a substantial extent, engaged in interstate commerce.

Appreciating the weakness of that position of the 2nd Circuit Court of Appeals, in opposition to the view of the other Circuit Court of Appeals, respondents' counsel go the extreme length of asserting to this Court that the record showed each of the suing employees each day or night *did* work upon each vehicle and that therefore each of such suing employees was proportionately as much engaged in interstate commerce each week as was the interstate use of the vehicles by the lessees.

This Court, is respectfully advised that on its face that is a physical impossibility. When twenty or more large motor trucks are in a given repair shop for major overhauls, each of which job takes from three to ten days, it is unwarranted for respondents' counsel to suggest that any evidence of record established that each of the mechanics in such repair shop in the course of each day and week worked upon each of the twenty trucks therein. Similarly in regard to greasing. The trucks are greased or not each day but in accordance with the mileage they have been run since the last greasing. If, in a given garage of the petitioner, there be stored each night 100 particular trucks and there are in that garage three or four greasers, it is preposterous to suggest that on this record is it shown that each of the three or four greasers each night greased *each* of the 100 trucks therein. It is equally absurd to suggest that in such a garage where those same 100 trucks were stored overnight would each of the five or six "washers" participate in the washing of *each* of those 100 vehicles. Not only does the record utterly fail to suggest any such extremity of circumstance but neither court below found the facts in that regard to be such as counsel for the respondents now belatedly assert.

Respectfully,

Charles E. Cotterill,
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New York, N. Y.
Counsel for Petitioner.

Dated: April 26, 1947.

Supreme Court of the United States

October Term, 1946.

No. 1225.

JOHN J. CASALE, INC.,
Petitioner,

AGAINST

LOREN SKIDMORE, *et al.*,
Respondents.

JOHN J. CASALE, INC.,
Petitioner,

AGAINST

JOSEPH MOONEY, *et al.*,
Respondents.

Respondents' Brief in Opposition to Petition For Writ of Certiorari.

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CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1946.

JOHN J. CASALE, INC.,
Petitioner,

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JOSEPH MOONEY, *et al.*,
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No. 1225.

Respondents' Brief in Opposition to Petition For Writ of Certiorari.

Statement of Matter Involved.

The petition for certiorari outlines the facts in a fragmentary manner, and in certain respects distorts the contents of the appeal record. We believe a more comprehensive, yet succinct, presentation will assist materially in the consideration of the application.

Summary of the Basic Facts Proved on the Trial.

(1) John J. Casale Inc. owned a number of trucks, each housed every night after its run, in one of several

garages maintained by the Casale Company in New York City, three in Manhattan, two in Brooklyn, one in Long Island City.

(2) *Each* of the trucks, so returned to the garage *each* night was, *each* night—inspected, washed, gassed, greased, oiled, tested for tire, clutch, transmission, engine and electrical ignition trouble, had minor repairs done, was placed for easy egress in the morning—and supervised for proper starting in the morning—which was all done during the night time and the early morning hours by

(a) *Washers,*—who washed the trucks, inside and out (R. 299-301),

(b) *Floormen,*—who gassed the trucks, checked them in, shifted and placed them, cleaned the windshields and door windows, and made them ready for easy despatch in the morning (R. 293-299),

(c) *Greasers,*—who checked water and oil and tires, greased the trucks, oiled the generators (R. 307),

(d) *Night Mechanics,*—who inspected the trucks as they came in, tuned motors, fixed brakes and clutches and lights, straightened bumpers, and did other minor repairs, and inspected trucks that were going out of the state on long trips; their duties included standing by in the morning to supervise their going out and to help them get started in case starting trouble developed (R. 216, 222-223, 281-283, 288-289, 292, 424).

(3) At the 21st St. (Manhattan) garage, the Casale company housed many of its trucks; also it maintained there an overhaul shop, to which each truck (from all garages) was sent after it had gone 14,000 miles (R. 26,

215). Here were employed mechanics and mechanics' helpers (referred to hereafter as "daytime mechanics" as distinguished from the nighttime mechanics). These daytime mechanics did overhaul work. In addition, they performed the following duties:

(a) They did "road work"—that is, they were sent out on the road to repair trucks that had broken down. Included were repair jobs on trucks that had

(1) Broken down outside of New York State,—mostly in New Jersey

(2) Broken down at steamship piers or railroad yards, while delivering goods for out-of-State transshipment, or receiving goods originating out-of-State

(3) Come in from the Hoboken (N. J.) garage of the Casale company, for minor adjustments, made necessary because there was no mechanic at that garage.

(b) Two of the plaintiffs, speaking for the daytime mechanics, testified: one, that he went out on road calls to New Jersey *at least once a week* and as often as *four times a day* while at the same time he went out on road calls to steamship piers and freight yards at *least once a week* (R. 275): the other, that he went out on road calls to steamship piers and freight yards constantly, at *least once a week,* and sometimes *four times a day,* and on road calls to New Jersey, *as often as four times a day* (R. 217, 218): that the trucks on which they worked thus came from all of the Casale garages, not merely those that were housed at the 21st St. garage (R. 275).

(c) The daytime mechanics also did minor repairs on the Bethlehem Steel Co. trucks that came in from the Hoboken (N. J.) garage—sometimes two or three a day, sometimes five or six during the day (R. 219, 226, 228).

(d) Four times during the year, for a period of one month, these daytime mechanics were required to come in at 6 a.m. instead of 8 a.m., to supervise the starting out of the trucks from the 21st St. garage, of the trucks housed there, and to do any minor repairs required to get them started (R. 216, 217)—made necessary because "there were no night mechanics on from six to nine, and in case anything developed, you had to be there in order to take care of it" (R. 216).

(4) The work of the employees was performed on or directed to the trucks hauling goods in interstate commerce *during the course of each week* and in fact, *during the course of each day*:

(a) The washers did their work in pairs and they washed *each* truck *each* and every night (including all the trucks that during that day hauled goods in interstate commerce)—(R. 300).

(b) The floorman performed his work *on each and every one* of the trucks *each* night, (including all the trucks that during the day had hauled goods in interstate commerce)—(R. 294).

(c) The greaser did his work *"with respect to each vehicle"* and his task was a "continuous *day-to-day* maintenance of the vehicles"—(including all the trucks that during the day had hauled goods in interstate commerce)—(R. 421).

(d) The nighttime mechanic "did work on *all* the trucks" (R. 424) and he *inspected each truck as it came in* (R. 424): his duties required him to be present in the early morning hours to supervise the going out of the trucks, and to help get them started in case of difficulty (including the trucks that during the day had hauled goods in interstate commerce)—(R. 216).

(e) The daytime mechanics, in addition to their overhaul work, worked *each and every week* and sometimes *each and every day,* on trucks that at the time of repair was in actual haulage of goods for interstate commerce (see Paragraph 3-b *supra*).

(5) Of the plaintiffs concerned, two of each work category testified on the trial—and it was stipulated that the testimony of those who testified apply to all of the plaintiffs in the same categories (R. 219, 303-305, 310-312).

(6) The Casale company carried on its business with full knowledge that its trucks were being used for haulage of goods interstate, and derived its income and profits from a business that contemplated such interstate haulage of goods in its trucks:

(a) The contract between the Casale company and its customers provided (Plffs.' Ex. 2, Sec. 8):

> "VIII.—That the Lessor (Casale) shall at all times, and at its own cost and expense, have each vehicle registered, licensed and maintained in operating condition *to comply with all traffic and highway laws and/or regulations of the States of New York, New Jersey and Connecticut.*" (Emphasis supplied.)

(b) All gas used by the trucks was furnished by the Casale company at the garages: if a truck ran out of gas—which happened when the truck travelled long distances—the chauffeur would buy gas and pay for it, and Casale company would reimburse the chauffeur. Casale company kept a record of such reimbursements, and the records show that Casale made such reimbursements regularly and often for gas so *purchased in New Jersey and Connecticut* (R. 32-35, Plffs.' Exhibits 7 and 8).

(c) It maintained a regular day-by-day practice of sending its mechanics on "road calls" to New Jersey and Connecticut and to steamship piers and railroad yards, to repair trucks then engaged in haulage of goods in interstate commerce (see 3b, *supra*).

(d) The Casale company sent out a questionnaire to its customers to determine the extent to which the customers hauled their goods in the Casale trucks in interstate commerce, and as a result of the replies, *ascertained that their trucks were being used in interstate commerce to the extent of 23%* (R. 42, 43).

(e) The Casale company admitted to definite knowledge that *at least 34 of its 70 customers* were using the Casale trucks in haulage of goods *interstate* (R. 157-161).

(f) In a previous case in which the Casale company was involved, the Casale company admitted that the use of its trucks by its customers *in interstate haulage of goods was approximately 30%* (R. 155).

(7) The value, in dollars, of the goods that were hauled each week by customers of the Casale company in the Casale trucks, was considerable; and annually it ran into the millions:

(a) R. C. Williams Co., wholesale grocers, whose Casale trucks were housed at 21st St., Manhattan, sent *each week*, thirty truckloads of goods to its *New Jersey* customers in *Casale trucks*: weekly, this amounted to $50,000—and annually it amounted to $2,600,000.00 (R. 263).

(b) Hoffman & Mayer, dealers in poultry, whose trucks were housed at the 21st St., Manhattan garage, sent its Casale trucks to deliver to its *New Jersey customers several times a week*, amounting annually to $600,000.00 in value: In fact, it brought in its iced poultry from Delaware each morning, and instantly the poultry was transferred to the Casale trucks, thus constituting continuous interstate shipment, even to its New York City customers: accordingly, the Casale trucks were used 100% of the time in interstate commerce, and the annual value of its deliveries in the Casale trucks, inclusive of New York City, was between $3,000,000.00 and $5,000,000.00 (R. 249).

(c) Liggett Drug Co., whose Casale trucks were housed at 21st St., Manhattan, maintained a central warehouse in Manhattan, from which it delivered its goods, in Casale trucks, to its constituent stores: it sent the Casale trucks to its *New Jersey* stores *four times each week*, and to its *Connecticut* stores *twice a week*: the value of the goods hauled thus to these stores amounted annually to approximately $100,000.00; however,

because it maintained the warehouse for the purpose of servicing its constituent stores, haulage of their goods to their New York City stores was haulage in interstate commerce: on this basis, it used Casale trucks in interstate commerce 100% of the time, and the annual value of this haulage would be figured at $470,000.00 (R. 255-262, Plffs.' Ex. 15).

(d) Jacob Ruppert, brewers, whose Casale trucks were housed at the 93rd St. garage (Manhattan) sent at least 11 trucks *each day* to deliver goods to its *New Jersey* customers in Casale trucks; the annual value of goods so shipped amounted to approximately $1,000,000.00 (R. 246).

(e) Austin Nichols Co., importers and rectifiers of spirits, whose trucks were housed in the Brooklyn garage, used the Casale trucks to pick up *imports* at piers in New York and New Jersey, *"sometimes once a week, sometimes twice, and sometimes every day in the week"* (R. 91). Also the Casale trucks were used to make deliveries *in New Jersey and Connecticut,* once, twice or three times *each week.* The value of one truckload was $15,000. The annual value of goods merely delivered in the Casale trucks interstate in New Jersey and Connecticut was $1,000,000.00, not considering the value of goods picked up at the piers (R. 91, 116).

(f) J. M. Huber Co., whose Casale trucks were housed at the Brooklyn garage, were manufacturers of printing inks: its trucks were used 50% of the time, *week after week, daily,* making deliveries of its products in Casale trucks to New Jersey customers and to freight forwarders and railroad terminals for shipment extra-State (R. 103).

(g) V. LaRosa & Sons, manufacturers of macaroni, housed its Casale trucks at the Brooklyn garage, serviced 1,000 customers in New Jersey, and sent between five and fifteen Casale truckloads to New Jersey *each week*, on the average one or two truckloads *each day*: it also sent two truckloads to Pennsylvania *each week*: the annual volume of goods shipped interstate in Casale trucks was over $1,000,000.00 (R. 48).

(h) Dannemiller Coffee Co., coffee importers and roasters, housed its trucks in the Brooklyn garage. It used the Casale trucks to pick up green coffee at the piers; one truck was used *90% of the time* in picking up imports deliveries to railroad terminals were made *daily*: it was testified "There was *always* coffee on the piers and we could find a job for them (the Casale trucks)" (R. 73).

(i) Benjamin Dorman, wholesale grocers, housed the Casale trucks in the Brooklyn garage: it used the Casale trucks *daily* to pick up goods consigned to them from out-of-State at the Eastern District rail yards: carloads came in *twice a week*, and two or three truckloads came off each carload: the Casale trucks were also used to deliver to customers in New Jersey, two or three truckloads *each week*: the average truckload had a value of between $2,000.00 and $2,500.00 (R. 60).

(j) John Morrell & Son, branch house of the National Packing Company, housed the Casale trucks at the Brooklyn garage: 10% of its products processed in its Brooklyn plant was carried in Casale trucks to its customers in New Jersey and Connecticut: the Casale trucks were sent to New Jersey twice *each week* (R. 360).

(k) Pabst Sales Co., New York branch of the national brewery bearing the same name, shipped beer to the Pullman Company for use in Pullmans, 95% of which went interstate: Casale trucks were used three times *each week* to make these deliveries (R. 335).

(l) Atlantic Macaroni Co., manufacturers of macaroni products, housed the Casale trucks in the Long Island City garage: *each week* it sent two or three truckloads in Casale trucks to New Jersey: the goods thus shipped interstate in the Casale trucks had an annual value of $131,000.00 (R. 206).

(m) Jones & Laughlin Steel Service Co., housed its trucks at the Long Island City garage: Casale trucks were sent *each day* to its New Jersey customers; this company had a policy of servicing its customers within a 30 mile radius of New York City, which necessarily included much of New Jersey and Connecticut; this company used the Casale trucks to carry goods to railroad terminals of goods consigned to other out-of-State customers. It produced delivery receipts for a representative period August 1 to August 15, 1942—which showed 47 shipments to New Jersey customers of finished fabricated steel products, for a total of 77,000 pounds, shipments made in Casale trucks on 10 different days during a fourteen-day period (R. 231).

(n) Edw. & John Burke, Ltd., manufacturer of soft drinks, and exclusive sales agent of E. & J. Burke Ltd., brewers, used the Casale trucks to deliver its products to the Pullman Company, for use on the Pullman trains, using the Casale trucks two or three times *each and every week* for such

purpose (R. 164,—Plffs.' Ex. 11) and made similar deliveries in the Casale trucks to the Pennsylvania and New York Central Railroads, once or twice *each week* (R. 172).

(o) The above recitals are indicative of the general picture disclosing the interstate haulage of goods in the Casale trucks; the parade of Casale customers to the witness stand was halted on the insistence of defendant's counsel,—who, in order to bring this about,—consented to a stipulation that the haulage of goods in interstate commerce by the Casale trucks was substantial (R. 379, fol. 1137—Opinion of Court R. 489, fols. 1466-7).

(8) From the facts shown, it is clear that there was overwhelming proof that the Casale trucks hauled goods in interstate commerce regularly, each day or several times each week, and recurrently, each and every week, in very substantial volume.

(9) The record shows that many of the Casale company customers were engaged in production for commerce, thus affording the basis for a contention that the Casale employees were engaged in an occupation necessary for production for commerce, and therefore, covered by the Act, on the second ground of coverage,—*i. e.,* engaged in production for commerce; but neither in the District Court nor in the Circuit Court did plaintiffs make an issue of this, for coverage is so clear on the principle that the plaintiffs were engaged in commerce—that to assert additional coverage on the theory of production would be merely cumulative.

Questions Raised By Petitioner.

The first question propounded by Petitioner, although differenty phrased by petitioner's counsel, is

> If an employee shows that his work activity is so directly tied to interstate commerce as to be in contemplation of law a part of it—must the employee, in addition, show, by independent evidence, that, on some other theory, the employer is engaged in commerce, in order to be covered by the Fair Labor Standards Act?

The short answer is (a) this Court has time and again said "No" to the question and (b) there is and can be no divergence of opinion on the point in the Circuit Courts (see Point I, *post*).

The second question propounded by Petitioner, although differently phrased, is

> Where an employer is engaged in the business of generally maintaining and repairing vehicles used by other concerns in interstate commerce, may its employees working on such vehicles be deemed engaged in interstate commerce within the meaning of the Fair Labor Standards Act?

The short answer is, that this Court has said "Yes" definitely to the exact question propounded, and has also answered the question in the affirmative by decisions closely analogous (see Point II, *post*).

The third question propounded by the Petitioner is

> May an employee recover under the Fair Labor Standards Act without showing that 'during any particular workweek he did actually perform his labor upon' trucks which hauled goods in interstate commerce?

The short answer to this question is (a) that there is no principle of law involved for the proof in the case

overwhelmingly shows that each employee continuously performed his work upon trucks which hauled goods in interstate commerce regularly, each and every week, indeed every day during the week, and recurrently, week after week, and (b) there is and can be no divergence of opinion in the Circuit Courts (see Point III, *post*).

POINT I.

It is well settled that it is enough if an employee, to be covered under the Fair Labor Standards Act, shows that his work activity is so closely tied to interstate commerce as to be in contemplation of law a part of it.

In a number of cases decided by this Court, it has been definitely decided that

(A) It is not necessary for an employee to show that the employer is engaged in commerce or in production for commerce, *aliunde* a showing that the employee himself is engaged in an activity closely connected with commerce or production for commerce and

(B) Where it is shown that an employee is engaged in commerce or in production for commerce—the employer is thereby deemed to be engaged in commerce or in production for commerce.

Kirschbaum v. *Walling*, 316 U. S. 517;
Warren Bradshaw Drilling Co. v. *Hall*, 317 U. S. 88;
Overstreet v. *North Shore Corp.*, 318 U. S. 125;
Pedersen v. *J. F. Fitzgerald Co.*, 318 U. S. 740;
Roland Electrical Co. v. *Walling*, 326 U. S. 657;
Martino v. *Michigan Window Cleaning Co.*, 325 U. S. 849.

The argument of Petitioner is the same that was used by the employer in the *Overstreet* case (*supra*)—the United States Circuit Court of Appeals (C. C. A. 5) holding with the employer (128 F. 2nd 450)—but on appeal to the Supreme Court, the argument being raised again, it was rejected.

In the *Kirschbaum* case, this Court ruled (316 U. S. 517, 524), that

> "To the extent that his employees are 'engaged in commerce or in production for commerce' the employer is himself so engaged."

The same precise question was raised in the New York State Courts in the case of *Pedersen* v. *J. F. Fitzgerald Co., supra* (see history recital of this case R. 558-562), and in those courts answered favorably to the employer —but the Supreme Court reversed the New York Court of Appeals, adverting to the *Overstreet* decision.

Petitioner cites the case of *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178—the case is not in point; all that was involved in that case was the question whether the *de minimis* doctrine was applicable to cases under the Fair Labor Standards Act.

On the question of conflict of decisions, the Petitioner has cited the case of *Lewis* v. *Florida Power & Light Co.,* 154 F. 2nd 751 (C. C. A. 5) as holding that an employee is bound to show that an employer is "engaged in commerce" regardless of other testimony that the employee's activity is so closely tied to commerce as to be in contemplation of law a part of it. The case does not so hold. The Circuit Court was merely passing on a finding of the District Court (based not upon a trial but upon pleadings and a stipulation which recited the business of the employer, ***but not the work activities of the employees***) that the stipulated facts did not show that the employer was engaged in commerce; the Circuit Court reversed the

District Court and held that some of the facts stipulated did in fact show the employer was engaged in commerce, and sent the case back for proof by the plaintiffs of the nature of their work.

The second case on the question of conflict, cited by Petitioner is *Wilson* v. *R. F. C.*, 158 F. 2nd 564—but the case is clearly not in point. The case is the simple case of an employee's activities being so remote from the commerce involved, that there was no coverage,—(*McLeod* v. *Threlkeld*, 319 U. S. 491—cited by that Court).

Clearly, then, there is no conflict on the point,—as indeed there cannot be, this Court having said the last word.

POINT II.

Plaintiffs working directly upon the vehicles that were used in interstate commerce regularly and recurrently—are engaged in commerce.

In the case of *Boutell* v. *Walling*, 327 U. S. 463, this Court held that employees of a company maintaining and repairing trucks used by another company to haul goods in interstate commerce were well within the coverage of the Fair Labor Standards Act.

In *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, this Court held that employees of a toll road company, over which flowed vehicles, some of which later completed their journey by means of an interstate highway, were engaged in commerce within the meaning of the Fair Labor Standards Act.

Applying the theory of the *Overstreet* case, this Court in the *Pedersen* case, reversed a determination of the New York Court of Appeals (that a laborer employed by a contractor engaged in working on a right of way of a railroad, over which some trains ran interstate was not en-

gaged in commerce) and held that the laborer was engaged in commerce—although the contractor was an independent contractor, and did his work locally.

The *Pedersen* case is closely analogous to the instant case, because the employees in question performed their work on instrumentalities of commerce. The *Overstreet* case is likewise analogous, for the same reason—even more authoritative, because recovery there was accorded a toll road ticket taker, whose duties were not quite as closely related to commerce as were those of the repairman in the *Overstreet* case, and the maintenance employees in the instant case. *The Boutell case is practically on all fours with the instant case—there is hardly a semblance of difference between the underlying facts in the Boutell case and this case.*

POINT III.

The record contains overwhelming proof that each of the employees worked in interstate commerce each and every week regularly and recurrently.

There is really no law question involved here: the Petitioner asserts that (Petition, p. 10)

> "The record so clearly shows that * * * there was no inherent reason why as to any particular employee there should have been any interstate labor by him during any one or another of any particular week"

and further asserts that from the evidence adduced by the plaintiffs

> "It would not follow that any individual one of these suing employees even so much as touched in

> the course of any particular week any one or more vehicles so used in interstate commerce by some one or another lessee."

It is upon this assumption that the third question posed to this Court is predicated. But, the evidence is contrary to the assumed hypothesis—for the record is replete with evidence that *each* employee, *each night,* each week worked upon *all* the vehicles, those which that day were engaged in haulage of goods interstate as well as the others,—that many Casale trucks hauled goods interstate each day, week after week, regularly, recurrently—in tremendous volume: that at least 34 out of the 70 customers used Casale trucks to haul goods in interstate commerce: that the extent of the interstate commerce use of the Casale trucks was generally between 23% and 30% and in some cases 100%. The United States Circuit Court of Appeals for the Second Circuit was correct in holding that no quarrel can be had with the Trial Court in inferring that the employees spent a substantial amount of time on trucks used in interstate commerce.

Cases have been cited by Petitioner in an attempt to build an argument of conflict on the point. In the two cases cited, it was held merely that the suing employees spent time on interstate work "occasionally", "sporadically", and failed to produce proof as to when precisely they performed such work in commerce, making it impossible for the Trial Court to compute the amount of recovery.

In those cases, *Schwartz* v. *Witwer Grocer Co.*, 49 F. Supp. 1003 and *Super-Cold Southwest Co.* v. *McBride,* 124 F. 2d 90—the questions decided were purely procedural. No principle was cited that is in conflict with any principle of law applicable to the facts in the instant case.

CONCLUSION.

The Petition Should Be Denied.

Respectfully submitted,

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